Supreme Court, U.S.
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No.97-1562

In The

Supreme Court of The United States

October Term, 1997

CORNELIA WHITNER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

MALISSA ANN CRAWLEY,

Petitioner,

v.

MICHAEL MOORE, AS DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Cornelia Whitner and Malissa Ann Crawley ("petitioners") respectfully submit this reply brief in further support of their petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of South Carolina in *Whitner v. State*, 328 S.C.1, 492 S.E.2d 777 (1997), and the subsequent decision in *Crawley v. Evatt*, relying on that decision.

SUMMARY OF THE ARGUMENT

The *Whitner* decision completely confounds this Court's Fourteenth Amendment jurisprudence, and squarely conflicts with the decisions of other state high courts, including those of Kentucky and Nevada, that have held that the due process guarantee of notice and its prohibition against vague criminal statutes preclude the use of child neglect statutes to punish women for their conduct during pregnancy. *See Sheriff v. Encoe*, 110 Nev. 1317, 1319, 885 P.2d 596 (1994); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993).

Respondents the State of South Carolina and Michael Moore, as Director of the South Carolina Department of Corrections ("respondents"), have failed to demonstrate that the constitutional infirmities inherent in the new interpretation of § 20-7-50 are not susceptible to this Court's review. Contrary to their assertion, prior unrelated decisions of the South Carolina Supreme Court did not provide petitioners with the constitutionally mandated notice. Furthermore, by accepting the State's proposed construction, the *Whitner* court placed its imprimatur on a vague criminal statute which provides no guidance to the government officials responsible for its enforcement. Finally, there is no support for respondents' claim that petitioner Crawley is barred from participating in the case before this Court.

I. *WHITNER* HAS CREATED AN INTOLERABLE CONFLICT AMONG STATE HIGH COURTS

Respondents are incorrect in their assertion that no conflict exists between South Carolina and any other state that has addressed the question of whether a preexisting child neglect statute (or drug delivery statute) may be applied to pregnant women's conduct. *See* Respondents' Opposition to the Petition for Certiorari ("Opp.") at 10-13. Their argument in this regard relies solely on the misapprehension that no state court addressing this issue has construed federal constitutional law in the process of reaching its determination. *Id.*

In fact, the state supreme courts in *Encoe*, 110 Nev. at 1319, 885 P.2d at 598, and *Welch*, 864 S.W.2d at 283, explicitly held that the constraints of federal due process notice requirements prohibited them from reinterpreting their respective child neglect statutes and giving them an entirely new meaning. *See* Petition for Certiorari ("Pet.") at 13-15. Furthermore, both courts concluded that they could not reinterpret their statutes to reach the conduct of pregnant women because such a construction would render the laws unconstitutionally vague. As the *Encoe* court stressed:

> If the statutes at issue are applied to women's conduct during pregnancy, they could have an unlimited scope and create an indefinite number of new 'crimes.'... [which] could be construed as covering the full range of a pregnant woman's behavior -- a plainly unconstitutional result that would, among other things, render the statutes void for vagueness.

110 Nev. at 1320, 885 P.2d at 598 (quoting *Welch*, 864 S.W.2d at 283). In contrast, the South Carolina Supreme Court expressly concluded that the Fourteenth Amendment's guarantee of due process did not constrain it from announcing the new crime of fetal abuse. *See Whitner*, 492 S.E.2d at 786. (22a)

Contrary to respondents' characterization of the *Whitner* opinion, the court below did not reinterpret § 20-7-50 to include viable fetuses based on any evidence of legislative intent or unique statutory language. Nothing in the legislative history supports the

new construction adopted by the *Whitner* court. Pet. at 12-16; *see also Whitner*, 492 S.E.2d at 787 (Moore, A.J. dissenting). (25a) Indeed, to the contrary, the South Carolina Legislature ("Legislature") has repeatedly considered the problem of substance dependency during pregnancy, and has, to date, rejected all proposals to criminalize such conditions.[1] Nor is the statutory language at issue here significantly different from that utilized in the other state statutes construed across the country. Pet. at 16. Furthermore, even if respondents' characterization of the bases of the lower court's decision was accurate, none of these grounds would serve to insulate the new interpretation from federal constitutional review. This Court cannot be bound by a state court interpretation which violates the federal constitution. *See Raley v. Ohio*, 360 U.S. 423, 436, 79 S.Ct. 1257, 1265 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); Justice O'Connor, *Our Judicial Federalism*, 35 Case W. L. Rev. 1, 5-6 (1984) (Supreme Court has power to review a state court judgment if state court "upholds a particular action on the ground that it offends neither federal nor state law.").

II. THE *WHITNER* COURT MISCONSTRUED THE FEDERAL GUARANTEE OF DUE PROCESS NOTICE

While respondents readily admit that "the legislature did not expressly state that a child in section 20-7-50 included a viable fetus" nor did it "proscribe fetal abuse in so many words," Opp. at 19-20, they nevertheless claim that petitioners were afforded constitutionally mandated due process notice. *Id.* at 20. Unable to find the requisite

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[1]Respondents' argument that "none of these [state court] decisions categorically rejected or prohibited the legislature's power to criminalize the conduct for which the Petitioners were prosecuted," Opp. at 11-12, fails because: (I) this issue was not before the courts addressing the circumstances presented here; (ii) several courts did, in fact, note that a statute crafted to do what the *Whitner* court did would be unconstitutionally vague, *see, e.g., Welch*, 864 S.W.2d at 283; and (iii) the Legislature did *not* exercise its power to draft such a statute, because there was no legislative support to do so.

notice in the language of the statute, statutory context, legislative history, or any prior interpretation of the statute, respondents are thus relegated to arguing that three earlier cases interpreting completely distinct areas of state law, *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984); *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960), and *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964), must be construed as providing the necessary due process notice. Opp. at 19. However, these cases involved neither § 20-7-50 nor the circumstances at issue here.

Because *Hall* and *Fowler* required the court to interpret a civil wrongful death statute, they fall squarely within the parameters of the development of common law tort principles, an area of the law in which state courts have traditionally been the primary engines of change. Petitioners cannot be expected to have divined the necessary due process notice from these decisions given their limited application. Similarly unavailing is respondents' contention that these decisions have always stood for the broad proposition that a viable fetus is a person vested with all legal rights. In fact, the *Whitner* court explained for the *first* time that these decisions should be interpreted in this way. *Whitner*, 492 S.E.2d at 780. (8a) Petitioners plainly could not have anticipated this new construction. Finally, petitioners cannot be expected to have garnered the requisite notice given the Court's perception of these decisions as articulated in *Roe v. Wade*:

> [S]ome States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life.

410 U.S. 113, 161, 93 S.Ct. 705, 731 (1973) (citing, Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame L. Rev. 349, 354-65 (1971)). Given this Court's understanding, no person could legally or logically be charged with notice of the proposition now urged by respondents.

Respondents' reliance on the decision in *State v. Horne*, is

similarly misplaced. First, the ruling in that case -- creating the new crime of "feticide" -- is based on the lower court's plenary authority to expand the common law. 319 S.E.2d at 704. Indeed, prior to the *Whitner* decision,[2] several lower courts had already noted this precise distinction, and specifically rejected respondents' argument in this regard. For example, as the court in *Tolliver v. State*, 90-CP-23-5178, Order (Ct. C.P., Greenville Cty, S.C. Aug. 10, 1992) (L. 171-77), *cert. denied*, (March 10, 1993), noted:

> The State relies on *State v. Horne*...to urge upon this court an interpretation of the word "child" to include "fetus." In that case, the South Carolina Supreme Court recognized for the first time in South Carolina the crime of feticide. But that case has no application to the facts of this case.... *In deciding the Horne case, the Supreme Court was exercising its power under the common law to make new law. This case does not involve the interpretation of common law.*

(Emphasis added). Second, contrary to respondents' contention, the decision in *Horne* does not involve the interpretation of § 20-7-50, nor does it propound an interpretation of the term "person" as used in any state statute. Beyond these distinctions, the *Horne* court's refusal to apply the newly defined crime of feticide retroactively appears to acknowledge the parameters of federal due process requirements. 319 S.E.2d at 704. Given the absence of support for their proposition, this Court must reject respondents' claim of notice.

III. *WHITNER* MISCONSTRUED THE PROHIBITION AGAINST VAGUE CRIMINAL STATUTES

Respondents' statement that "[t]he sole question before the

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[2]In South Carolina, "[t]here is no distinction between statutory and common law murder: the statute is merely declaratory of the common law." *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338, 339 (1989). By contrast, the South Carolina Supreme Court has no authority to expand the crime of child neglect because it is a statutory creature, and not a crime at common law. Moreover, a fetus was not recognized as a separate person in relation to a pregnant woman at common law. *See State v. Ashley*, 701 So. 2d 338 (Fla. 1997).

state supreme court and this Court is whether the State may prosecute this defendant for harm to a viable fetus from an admittedly unlawful act - the possession and use of crack cocaine," Opp. at 22, is fatally flawed.[3] South Carolina seeks to punish petitioners and other substance-dependent women who become pregnant for the crime of "child neglect" when the only unlawful act they could possibly be prosecuted for is "possession" of crack cocaine.[4] *See* S.C. Code Ann. § 16-1-90. This is the only crime in South Carolina which may even arguably apply under such circumstances as found here, and the only one for which petitioners could constitutionally be charged with notice.

In reality, respondents merely seek to achieve here what they have not been able to achieve through legislative enactment. And, once laid bare, it is clear that this effort contorts existing criminal law in South Carolina beyond all recognition. In this tortured endeavor, respondents seek both to stigmatize petitioners and to punish them more harshly as "child abusers" under § 20-7-50, a statute intended solely to address child neglect, for their purported "possession" of illegal substances. However, respondents cannot support an arrest and prosecution of petitioners for "possession" as that crime has been interpreted and enforced to date. *See* S.C. Code § 16-1-90; *State v. Major*, 301 S.C. 181, 184, 391 S.E.2d 235, 237 (1990). Nor can

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[3]Respondents' contentions that petitioners "admitted that they harmed their children," and the children were "born suffering from drug withdrawal symptoms," Opp. at 23-24, are supported neither by the record, *see* (51a-56a; 75a-81a), nor scientific research. *See* Zuckerman, Barry, "Drug Exposed Infants: Understanding the Medical Risk," in *The Future of Children* 26, 31 (1991) ("A withdrawal syndrome has not been identified and, therefore, at this time it is inaccurate to describe a cocaine-exposed newborn as crack-addicted.").

[4]Respondents' claim that "use" of an illegal substance is a crime in South Carolina, Opp. at 22, is false. No South Carolina statute incorporates this notion, and no state court to date has so ruled. Moreover, this Court has long recognized that drug addiction is a disease, not a crime. *See Robinson v. California*, 370 U.S. 660, 667 n.8, 82 S.Ct.1417, 1420, n.8 (1962); *Linder v. United States*, 268 U.S. 518, 45 S.Ct. 446 (1925).

they do so with regard to "child neglect," as that crime has been interpreted and enforced to date. For these reasons, they sought to use a woman's substance addiction as the basis for the prosecution of a crime that is not on the books, has *never* been interpreted as subsumed under the existing child neglect statute, and, in fact, was rejected by the Legislature. Respondents cannot graft an element (or some variation of an element) of one crime -- here, the crime of possession -- onto an existing statute that criminalizes different conduct -- *i.e.*, child neglect -- and then proclaim that the resulting new offense has always been recognized. This Court cannot find the required due process notice in this *post hoc* revision of a felony statute. Respondents are relegated to enforcing the existing penal laws of South Carolina; they are not empowered to manufacture new crimes by way of enforcement.[5]

Furthermore, respondents' argument that the wholly-undefined scope of conduct covered by this newly created class of crimes does not render the interpretation unconstitutionally vague, *see* Opp. at 22-23, completely misconstrues federal law. In fact, § 20-7-50, as interpreted by the court below, runs so far afoul of cardinal due process principles that no judicial construction could rectify the statute's constitutional shortcomings. The statute, construed to apply to a woman's prenatal conduct, is impermissibly vague, both in the sense that it fails to provide any notice of the "conduct ... forbidden by the statute," *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812 (1954), and encourages subjective and discriminatory arrests and convictions. *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-42 (1940).

Respondents concede -- as they must -- that nothing in § 20-7-50 "proscribe[s] fetal abuse in so many words." Opp. at 20. They

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[5]This Court has repeatedly stressed that penal statutes which are silent on the issue of mental state must be construed "in light of the background rules of the common law" under which "the requirement of some mens rea for a crime is firmly embedded." *Staples, III v. United States*, 511 U.S. 600, 605, 114 S.Ct. 1793, 1797 (1994); *see United States v. United States Gypsum Co.*, 438 U.S. 422, 436, 98 S.Ct. 2864, 2873 (1978).

further concede, *id.* at 22-23, as did the court below, *see Whitner*, 492 S.E.2d at 782 (12a), that the new interpretation creates a law with an "unlimited scope" with the potential to engender an "indefinite number of new crimes." *See Welch*, 864 S.W.2d at 283. As the court aptly noted in *Welch*, such a broad and ill-defined scope "could be construed as covering the full range of a pregnant woman's behavior -- a plainly unconstitutional result that would, among other things, render the statutes void for vagueness." *Id.* The principle is well-established that where the activities proscribed are so uncertainly defined, the offending ordinance must be struck for vagueness. *See, e.g., Palmer v. Euclid*, 402 U.S. 544, 91 S.Ct. 1563 (1971).

Because § 20-7-50 was written for an entirely different purpose, there is no delineation of any objective criteria for determining what an individual must do to satisfy the commands of the statute. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939). Moreover, respondents' case-by-case approach only serves to exacerbate this defect. Under these circumstances, there can be no doubt that petitioners could not possibly have foreseen that their prenatal conduct might render them subject to criminal prosecution.

In addition to concerns about providing notice to citizens, the Court has emphasized that the potential for "arbitrary and discriminatory enforcement" is a particular evil that vagueness review is designed to combat:

> Although the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." [*Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242 (1974)]. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 1858

(1983). Respondents' attempt to circumvent these fundamental precepts of the vagueness doctrine is thinly veiled.[6] They cannot avoid the infirmities inherent in their newly established crime merely by pronouncing that petitioners had notice that their conduct violated the statute. *See* Opp. at 24. The ill-defined panoply of crimes for which respondents seek this Court's approval simply does not pass constitutional muster.

Finally, respondents cannot cure these constitutional infirmities simply by positing the possible parameters for future prosecutions. *See* Opp. at 24-25. First, the proposed parameters do not -- and indeed, cannot -- cure either the due process notice or vagueness defects underlying the prosecution of petitioners in this case. *Id.* Second, the limitations noted -- *e.g.*, proof of causality and harm -- cannot remedy the unjust prosecution of these women in the first instance.

IV. BECAUSE THE *WHITNER* DECISION WAS NOT BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS, THIS COURT IS NOT PRECLUDED FROM REVIEWING THAT DECISION

Respondents' contention that petitioner Crawley is not entitled to raise any federal constitutional claims is without basis in law or fact. *See* Opp. at 25-28. First, respondents admit that petitioner Crawley raised federal due process claims in her state habeas corpus petition, and that the court specifically noted these claims in its recitation of the issues raised. *See id.* at 26; (84a-87a); *see also Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S.Ct. 2513 (1991).

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[6]Contrary to respondents' claim, Opp. at 23, this Court may review petitioners' challenge to the new interpretation of § 20-7-50 precisely because the circumstances contemplated by this Court in *Webster v. Reproductive Health Services*, 492 U.S. 490, 506, 109 S.Ct. 3040, 3050 (1989) are now present. The *Whitner* court, by retroactively incorporating a new declaration of fetal personhood into the statute, has unconstitutionally burdened petitioners' reproductive rights. Thus, the concerns raised by the Court in *Webster* have now come to fruition.

Second, the law is clear that this Court may review by certiorari final judgments on federal questions arising in state courts. *McGoldrick v. Compaignie Generale*, 309 U.S. 430, 434, 60 S.Ct. 670 (1940). Third, there is no applicable state procedural bar precluding this Court's review of the constitutional issues addressed below,[7] and fourth, even if there was such a bar, it would not constitute an adequate and independent state ground for the lower court's decision. *See Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638 (1985) (procedural bar does not preclude Supreme Court review if state court does not rely on it).

CONCLUSION

This Court should grant the petition for certiorari in order to redress the conflict among state courts regarding the interpretation of federal due process guarantees.

Dated: New York, New York
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[7] *Evans v. Manning*, 217 S.C. 10, 59 S.E.2d 341 (1950), is inapposite because the decision merely holds that issues not raised in a habeas petition cannot later be revived in the appellate court reviewing the habeas determination. Moreover, in this case, petitioner Crawley raised the federal constitutional claims in her habeas petition.